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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

DANIEL ALVAREZ,
Petitioner,

v.

WILLIAM E. BOYD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

What is the correct legal standard for claims of "cumulative error" asserted in habeas corpus petitions pursuant to 28 U.S.C. § 2254, an issue which has divided the Courts of Appeal?

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DANIEL ALVAREZ, *Petitioner*

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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Daniel Alvarez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion and judgment of the District Court is reported at 58 F. Supp. 2d 882 (N.D. Ill. 1999). (App. A, *infra*, 1a - 15a). The order of the District Court granting in part a certificate of appealability is unreported. (App. B, *infra*, 16a-17a). The opinion of the Court of Appeals is reported at 225 F.3d 820. (App. C, *infra*, 18a-28a). The denial of the petition for rehearing and suggestion for rehearing *en banc* is unreported. (App. D, *infra*, 29a-30a).

JURISDICTION

The Court of Appeals entered its judgment on August 29, 2000. A petition for rehearing and suggestion for rehearing *en banc* was denied on October 24, 2000. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of 28 U.S.C. § 2254 are reproduced in the Appendix hereto at App E.

STATEMENT OF THE CASE

This petition raises the important and recurring question of the correct standard for "cumulative error" analysis in habeas corpus petitions challenging state court convictions pursuant to 28 U.S.C. § 2254. The Courts of Appeal are severely split on this issue. Some reject cumulative error analysis altogether. Others allow it, but under differing standards. In rejecting Alvarez' petition, the Seventh Circuit articulated a burdensome standard that diverges from the standards adopted by other circuits. It also conflicts with *O'Neal v. McAninch*, 513 U.S. 432 (1995) which held that when a federal judge finds constitutional error and is in "grave doubt" as to its effect on the jury's verdict, the habeas petition should be granted.

The Seventh Circuit's opinion admits this was a "close case" with "very conflicting evidence." App. C at 19a. Alvarez' alibi was supported by disinterested witnesses. No physical evidence linked Alvarez to the crime. The eye-witness to the attack testified that Alvarez was *not* the assailant. The opinion acknowledges that there was "reason to believe that Alvarez may not have been the attacker." App. C at 21a. The State's entire case hinged on the victim's identification. Alvarez contends that the cumulative effect of trial errors deprived him of his constitutional right to a fair trial.

A. Proceedings Below

An Illinois jury convicted Alvarez of attempted first-degree murder and the trial court sentenced him to forty years in prison. Two Illinois state courts rejected his direct appeal, and Alvarez filed a habeas petition in federal District Court. The District Court denied the habeas peti-

tion, concluding that the trial court committed no errors, but even if it did, the errors were harmless. *See* App. A. Nevertheless, the District Court issued a certificate of appealability regarding Alvarez' claim that the cumulative effect of trial errors denied him a fair trial. The Seventh Circuit rejected Alvarez' cumulative error claim and affirmed the denial of the habeas petition. *See* App. C.

B. Relevant Facts Regarding the Crime

The morning of the crime, Daniel Alvarez arose at approximately 5:45 a.m. to go to the Royal Crown Cola plant in Chicago to interview for a job. (H182).[1] He was at the plant no earlier than 6:15 a.m. When he arrived he spoke with a security guard and two Royal Crown employees. (H113, H183-185). Because trucks needed to be dispatched, Alvarez was told to return around 7:30 a.m. for his interview. App. C at 21a. Alvarez testified he went to a nearby restaurant for something to eat. *Id.* Royal Crown employees confirmed that he returned to the plant between 7:30-8:00 am. *Id.* Once inside the plant, Alvarez filled out an application and eventually had a successful interview.

In the meantime, approximately 15 miles away, at 7:00 a.m., Alicia Godina was walking to catch a commuter train when she was attacked by a man with a knife. (G56-68). She received multiple stab wounds and underwent successful emergency surgery. (G32-33). She later claimed Daniel Alvarez, an ex-boyfriend, attacked her. The Seventh Circuit was troubled by the sequence of events and the timing:

> [the] narrow space of time raises some troubling questions. It gave Alvarez, at most, one hour and

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[1] References to the transcript of proceedings before the trial court are noted by the alphabetical volume and page number. *E.g.*, "G50."

> forty-five minutes to drive from the Royal Crown plant to the scene of the attack. . . . park his van, stalk and stab Godina, flee to his van, ditch the knife, perhaps clean up any blood and ensure that he did not leave any traces in the van, and drive back to the plant and look presentable at the interview. And all this during peak driving times.

App. C at 21a-22a. Prosecution and defense witnesses testified that the driving time between the Royal Crown Plant and the crime scene ranged from 37 - 43 minutes during rush hour. App. C at 22a. The Seventh Circuit stated that because "the attack occurred around 7:00, and the undisputed testimony was that Alvarez was at the plant no earlier than 6:15, it would have been difficult for him to have committed the crime." *Id.*

That same afternoon, the police arrested Alvarez at his parents' house. The police searched the entire house and the van Alvarez drove to the interview and found no incriminating physical evidence. App. C at 20a. Alvarez has always maintained his innocence.

At trial, eyewitness Peter Thompson testified that on the morning of the crime (December 14, 1993), at about 7:00 a.m., he was walking out of his house and saw a man walking behind a woman. (H6). Then, while Thompson was only two or three feet away, he saw the man stab the woman. (H9, H10, H36). Thompson ran to his car nearby to get a bat. As he returned, Thompson made eye contact with the attacker who then fled. (H10). Thompson gave a detailed description, including facial features, hair color, mustache, build and height. App. C at 21a. Thompson testified at trial that Alvarez was not the attacker.

The victim, Alicia Godina, testified that on the morning of the attack she left her house at about five minutes to 7:00 to walk to her train. (G56-57). A man came up from behind and started stabbing her with a knife. (G56-

67). She heard someone else tell the attacker to leave her alone, and the attacker ran after him. (G64-65). After they ran away, Godina said, "I was halfway standing, I felt faint." (G65). Seconds later, the attacker returned, knocked her to the ground, and began cutting her throat. (G65-67). Godina closed her eyes to feign death and the attacker ran off. (G67). When Godina got to the emergency room, she was feeling "very faint." (G68-69). A nurse testified that in the emergency room, Godina said (without mentioning any names) her "ex-boyfriend" stabbed her. App. C at 19a. Godina later recalled that her attacker "was wearing a black coat about thigh length." (G73). The clothes Alvarez was wearing the day of the attack did not match the descriptions Godina and the eyewitness (Thompson) gave of the attacker.[2] At trial, Godina identified Alvarez as the assailant. (G45).

Godina gave a written account of the stabbing to a State's Attorney while she was in intensive care. The statement failed to identify Alvarez. (G103, 104). However, she testified that, about two minutes before giving the written statement, she was shown some pictures and she identified a picture of Alvarez. (G112) The prosecutor failed to disclose the alleged photo identification to defense counsel before trial, despite a written discovery request. The alleged photo identification was the first time Godina specifically implicated Alvarez.

C. Trial Errors

Alvarez contends the trial court committed several other errors. First, Thompson, the eyewitness, would have told the jury that on two occasions after the attack, but before trial, he saw Alvarez and declared that Alvarez was not

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[2] That day Alvarez was wearing a blue, waist-length coat, blue jeans, work boots, and a green-striped tee shirt. (H189, H213).

the attacker. A private investigator showed him a number of pictures including a photo of Alvarez and Thompson declared that none of the photos was of the attacker. (F17-19). He also saw Alvarez in the presence of defense counsel one afternoon in the summer of 1994 at the crime scene and stated, "[n]o, no that's not him," or words to that effect. The State filed a motion *in limine* that the trial court granted, ruling that the statements were hearsay. (F26-27, H14-19, H51-53).

Second, at trial Alvarez sought to challenge the reliability of the victim's identification by showing that she had a tendency to faint (it is undisputed that she had a fainting history). On direct examination, Godina admitted that at one point during the attack, "I was halfway standing, I felt faint." (G65). On cross-examination Godina *admitted that she had experienced fainting spells in the past.* (G97). But when defense counsel asked her, "[y]ou have fainted before when you have had a traumatic experience, correct?" the trial court immediately interrupted (prior to an objection by the State) with "[s]ustained." (G97, ln. 18). Defense counsel then made an offer of proof, stating that he had medical records showing the victim had fainted on at least four occasions. (G98-99). Nevertheless, the court prevented all cross-examination in this area. (G99).

D. Seventh Circuit's Opinion

Alvarez' habeas petition contends, *inter alia*, that the cumulative effect of the above errors deprived him of a fair trial. The Seventh Circuit rejected Alvarez' cumulative error claim and affirmed the District Court's denial of Alvarez' habeas petition. In so doing, it formulated the following two-pronged standard:

> [t]he cumulative effect analysis requires a petitioner to establish two elements: (1) at least two errors were committed in the course of the trial; (2) considered together, along with the entire record, the

> multiple errors so infected the jury's deliberation that they denied the petitioner a fundamentally fair trial.

App. C at 25a. The Seventh Circuit's standard also requires the petitioner to show that the errors "could not have been harmless":

> [t]o warrant relief, the reviewing court must determine that the effect of the errors, considered together *could not have been harmless*. Put another way, a court must be *firmly convinced* that *but for the errors, the outcome of the trial probably would have been different*.

Id. at 26a (emphasis added) (citations omitted). The Seventh Circuit concluded that Alvarez failed to establish at least two errors (App. C at 26a); but even if he had, the errors "could not have caused Alvarez prejudice." *Id.* at 27a. Although the Seventh Circuit denied habeas relief, it stated that the "sharply conflicting testimony of Godina on the one hand and Alvarez and Thompson on the other, coupled with other conflicts of timing and motive, do make this a close, even troubling case." App. C at 28a.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEAL ARE SPLIT ON WHETHER CUMULATIVE ERROR IS AVAILABLE FOR § 2254 PETITIONS.

The Seventh Circuit's opinion acknowledged the split in the circuits over whether cumulative error claims are viable in habeas cases. App. C at 24a, n.1. However, the opinion significantly understated the extent of the conflict.

A. The Eighth and Fourth Circuits Reject Cumulative Error Analysis.

The Eighth Circuit rejects cumulative error analysis in habeas cases. In *Wainwright v. Lockhart*, 80 F.3d 1226 (CA8 1996), *cert. denied* 519 U.S. 968 (1996) the court declared: "[e]rrors that are not unconstitutional individually cannot be added together to create a constitutional violation. Neither cumulative effect of trial errors nor cumulative effect of attorney errors are grounds for habeas relief." 80 F.3d at 1233 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). *See also Scott v. Jones*, 915 F.2d 1188 (CA8 1990) *cert. denied* 499 U.S. 978 (1991) ("This court has said that cumulative error does not call for habeas relief, as each habeas claim must stand or fall on its own."); *Girtman v. Lockhart*, 942 F.2d 468, 475 (CA8 1991) (same, citing *Scott*).

The Fourth Circuit has expressed a similar view:

> [h]aving just determined that none of counsel's actions could be considered constitutional error, it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. . . . To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now.

Fisher v. Angelone, 163 F.3d 835, 852 (CA4 1998). *See also Arnold v. Evatt*, 113 F.3d 1352 (CA4 1997) (rejecting request to review alleged errors of a trial court cumulatively rather than individually), *cert. denied*, 118 S. Ct. 715 (1998); *Rocheville v. Moore*, 175 F.3d 1015, n.6 (CA4 1999) (refusing to consider cumulative effect of attorney errors, citing *Fisher*).

B. Other Circuits Consider the Cumulative Effect of Errors, but the Standards Differ.

By contrast, the majority of circuits that have addressed the issue allow cumulative error analysis in the ha-

beas context. However, they apply widely differing standards of review. Some courts set forth strict multi-pronged tests (like the Seventh Circuit's), while others allow cumulative error analysis without specifying a particular standard at all.

The Fifth Circuit in *Derden v. McNeel*, 978 F.2d 1454 (CA5 1992) (*en banc*) *cert. denied* 508 U.S. 960 (1993) adopted a rigorous standard for cumulative error analysis:

> [W]e now hold that federal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors "so infected the entire trial that the resulting conviction violates due process.

978 F.2d at 1456 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973).). *Derden* continues to be followed in the Fifth Circuit. *See, e.g., Westly v. Johnson*, 83 F.3d 714, 726 (CA5 1996) cert. denied 519 U.S. 1094 (1997); *Livingston v. Johnson*, 107 F.3d 297, 309 (CA5 1997).

The Tenth Circuit took a less restrictive approach in *United States v. Rivera*, 900 F.2d 1462 (CA10 1990) (*en banc*):

> [t]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. . . . [Cumulative error] analysis is an extension of the harmless-error rule, which is used to determine whether an individual error requires reversal.

900 F.2d at 1469 (citations omitted). The court also stated that cumulative error analysis is the same analysis as for individual errors:

> [u]nless an aggregate harmlessness determination can be made, collective error will mandate reversal, just as surely as will individual error that cannot be considered harmless. The harmlessness of cumulative error is determined by conducting the *same inquiry as for individual error* -- courts look to see whether the defendant's substantial rights were affected.

Id. at 1471 (emphasis added) (citations omitted). Habeas cases in the Tenth Circuit have relied on *Rivera*'s cumulative effect standard. *E.g.*, *Van Woudenberg v. Gibson*, 211 F.3d 560, 571 (CA10 2000); *Moore v. Reynolds*, 153 F.3d 1086, 113 (CA10 1999) *(cert. pending), cert. denied*, 526 U.S. 1025 (1999).

The Eleventh Circuit has a four-factor standard for cumulative error analysis that has evolved from prosecutorial misconduct cases:

> [d]ifferent factors have been utilized by various courts in order to decide whether or not the cumulative errors at trial could be said to have, in reasonable probability, changed the result at trial: 1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; 2) whether they are isolated or extensive; 3) whether they were deliberately or accidentally placed before the jury; and 4) the strength of the competent proof to establish the guilt of the accused.

Walker v. Davis, 840 F.2d 834, 838 (CA11 1988); *see also Davis v. Zant*, 36 F.3d 1538, 1549 (CA11 1994) (citing *Walker* for the four-factor test).

The Ninth Circuit recognizes that cumulative errors may warrant habeas relief, but has not set forth a particular standard. *See Mak v. Blodgett*, 970 F.2d 614, 622 (CA9 1992), *cert. denied 507* U.S. 951 (1993) ("We do not need

to decide whether these deficiencies alone meet the prejudice standard [of *Strickland*] because other significant errors occurred that, *considered cumulatively*, compel affirmance of the district court's grant of habeas corpus as to the sentence of death." (emphasis added)). *Mak* remains the law in the Ninth Circuit. *See, e.g., Harris v. Wood*, 64 F.3d 1432, 1439 (CA9 1995); *Dubria v. Smith*, 224 F.3d 995, 1008 (9th Cir. 2000) (dissent).[3] Apparently the remaining circuits have yet to address the issue.

C. The Question Presented is Important and is Ready for Resolution.

The conflicting standards between the circuits strongly suggest that a prisoner's mere location may determine whether he would receive habeas relief. The Fourth and Eighth Circuits reject cumulative error analysis, contrary to the majority of circuits. The Tenth Circuit says that cumulative error analysis is the same as harmless error analysis (*Rivera*). The Fifth, Eleventh and Seventh Circuits have different multi-pronged tests. Such inconsistency should not be tolerated. The constitutional guaranty of a fair trial cannot mean one thing in the Seventh Circuit and another thing in the Eighth. The issue is important because

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[3] The Sixth and Second Circuits also allow cumulative error analysis without specifying a particular standard. *See Cooper v. Sowders*, 837 F.2d 284, 288 (CA6 1988) ("when considered cumulatively, these errors produced a trial setting that was fundamentally unfair."); *McKinnon v. Ohio*, 67 F.3d 500, 1995 WL 570918 (CA6 1995) (citing *Cooper v. Sowders* for cumulative error standard). The leading case in the Second Circuit is *Rodriguez v. Hoke*, 928 F.2d 534, 538 (CA2 1991) (recognizing that petitioner's claim can "turn on the cumulative effect of all of counsel's actions" and remanding to dismiss the habeas petition so the state court could consider all claims together). *See also Caballero v. Keane*, 42 F.3d 738, 741 (CA2 1994) (citing *Rodriguez*).

"[h]abeas corpus challenges to state court convictions are among the most frequently litigated matters in the federal courts, and assessment of harmlessness is probably the single most recurring issue presented in such cases." *Smalls v. Batista*, 191 F.3d 272, 281 (CA2 1999).

The conflict in the circuits is ready for resolution. Numerous decisions have already grappled with the issue. Moreover, the reasons for habeas review here are particularly compelling because it involves a conviction that hinges on facts the Seventh Circuit itself found were both "close" and "troubling." The Seventh Circuit acknowledged that multiple errors may have a "synergistic effect" requiring courts to "determine whether the whole is greater than the sum of its parts." App. C at 25a. The Seventh Circuit, however, completely failed to apply this reasoning in this close case. Further, because of the 1996 amendments to the habeas statute,[4] the lower courts need this Court's direction as to how to apply cumulative error analysis to the new requirements of section 2254. This Court's recent habeas decisions in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), *O'Neal v. McAninch*, 513 U.S. 432 (1995), and *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1995 (2000), have clarified some of the analysis regarding harmless error and the requirements of section 2254 petitions. A logical and workable standard can emerge from those precedents.

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[4] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") codified in pertinent part at 28 U.S.C. § 2254.

II. THE SEVENTH CIRCUIT'S DECISION IS ERRONEOUS.

A. The Seventh Circuit's Cumulative Error Standard is Contrary to *O'Neal*.

The Seventh Circuit's "cumulative error" standard conflicts with *O'Neal v. McAninch*, 513 U.S. 432 (1995). *O'Neal* held that a habeas petitioner does not bear the "burden of establishing" whether the error was prejudicial. *Id.* at 437 (reversing 3 F.3d 143, 145). In so doing, this Court stated: "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." *Id.* at 436; *see also id.* at 437-38 (quoting *Kotteakos v. United States*, 328 U.S. 750 (1946)). The Court explained "[b]y 'grave doubt' we mean that in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id.* at 435. Further, "the opposite rule denying the writ in cases of grave uncertainty . . . would tell judges who believe individuals are quite possibly being held 'in custody in violation of the Constitution' that they cannot grant relief." *Id.*

The Seventh Circuit's opinion conflicts with *O'Neal*. The opinion states that "[t]o warrant relief, the reviewing court must determine that the effect of the errors, considered together, *could not have been* harmless." App. C at 26a (emphasis added). This language imposes a degree of certainty that is much more onerous to the habeas petitioner than the "grave doubt" standard of *O'Neal*. The Seventh Circuit also said that "a court must be *firmly convinced* that *but for* the errors, the outcome of the trial probably would have been different." *Id.* (emphasis added). This language places on the petitioner the burden of proving "but for" causation and is similar to the re-

quirement of the petitioner having the burden of establishing that the error was prejudicial that was reversed in *O'Neal*. 513 U.S. at 445.[5] Thus, the Seventh Circuit's "firmly convinced but for the errors" standard is contrary to the "grave doubt" standard in *O'Neal*.

The Seventh Circuit's own assessment that this is a "close" and "troubling" case meets the "grave doubt" standard of *O'Neal*. Alvarez was over 15 miles away interviewing for a job on the morning of the attack. No physical evidence connected Alvarez to the crime, and even the eyewitness said Alvarez did not do it. The Seventh Circuit's failure to apply the "grave doubt" standard articulated in *O'Neal* was error.

B. The Trial Court's Errors Were "Contrary to" Supreme Court Precedent.

Under section 2254, the Seventh Circuit should have considered whether the challenged evidentiary rulings were "contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) & (2); *Williams v. Taylor*, 529 U.S. 362 (2000). However, without explanation, the Seventh Circuit ignored the Supreme Court cases cited by Alvarez. The District Court and the Seventh Circuit concluded in the briefest fashion that the state court did not err in its rulings. They failed, however, to fully consider the governing Supreme Court precedent that establishes that the rulings were, in fact, erroneous.

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[5] It also contravenes the standard for harmless error that this Court stated in its unanimous opinion in *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (harmless error inquiry considers "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (emphasis original)).

1. Under *Chambers v. Mississippi*, the Trial Court Erred by Excluding Exculpatory Identification Testimony as Hearsay.

Eyewitness Peter Thompson would have told the jury that well before trial on separate occasions he viewed both a photo array and Alvarez in person. Both times he declared that Alvarez was not the attacker. The trial court erroneously barred this testimony as hearsay.

The trial court's ruling was "contrary to" *Chambers v. Mississippi*, 410 U.S. 284 (1973). In *Chambers*, the defendant was accused of murder. Defendant sought to introduce testimony that another man had confessed, but was prevented from eliciting this testimony on hearsay grounds. This Court reversed the conviction, observing that (1) the statements were critical to the defense; (2) the statements bore substantial assurances of trustworthiness, being corroborated by other evidence; and (3) that the witnesses were available for cross-examination. This Court declared: "[i]n these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302. *Chambers* is controlling authority here. Exculpatory evidence was improperly and "mechanistically" excluded under the hearsay rule. This, even though (1) the statements were critical to Alvarez; (2) the statements bore indicia of reliability; and (3) Thompson was available for cross-examination.

Alvarez cited *Chambers*, yet the Seventh Circuit did not mention it; instead, it merely stated: "Alvarez has not demonstrated that this was not hearsay, or that an exception to the hearsay rule is applicable." App. C at 27a. This is incorrect. Alvarez established that three other Courts of Appeals have determined that statements like Thompson's, that an individual is *not* the person he saw commit the offense, fall under the "identification" category of statements

that are non-hearsay. *E.g., United States v. Brewer*, 36 F.3d 266, 271 (CA2 1994); *United States v. Brink*, 39 F.3d 419, 424-26 (CA3 1994); *United States v. Duarte*, 691 F.2d 508, 1982 U.S. App. LEXIS 25919 at *9 (CA9 1982). The District Court below conceded that "these federal decisions generally support Alvarez's interpretation of the identification exception . . ." App. A at 11a. However, the Seventh Circuit ignored these cases, as well as *Chambers*. Under *Chambers*, the trial court committed constitutional error.

2. Under *Smith v. Illinois*, and *Alford v. United States*, the Trial Court Erred in Refusing to Allow Alvarez to Cross-Examine the Witness Against Him.

It was undisputed that the victim had a history of fainting episodes. Defense counsel sought to cross-examine Godina regarding these fainting episodes. When counsel asked "[y]ou have fainted before when you have had a traumatic experience, correct?" the trial court interrupted by stating "[s]ustained." (G97, ln. 18). During a sidebar, defense counsel offered proof through medical records that Godina had a history of unexplained fainting spells, and that she had fainted on at least four occasions. Counsel urged, "[t]hat is the defense we wish to put on and that is the defense we're asking your Honor to allow us to put on by cross-examining her on this point." (G99). Nevertheless, the court prevented all cross-examination in this area.

The trial court's ruling is contrary to *Smith v. Illinois*, 390 U.S. 129 (1967). In *Smith*, the defendant was accused of selling a bag of heroin to a police informant in a restaurant. Only the prosecution witness and the defendant testified to the crucial events inside the restaurant. 390 U.S. at 130. "The only real question at trial, therefore, was the relative credibility of the [defendant] and this prosecution witness." *Id.* On cross-examination, defense counsel

asked for the witness' correct name and where he lived. The trial court sustained objections to these questions. This Court held that this restriction of cross-examination violated the defendant's constitutional rights. *See also Alford v. United States*, 282 U.S. 687, 692-94, (1931) (trial court's refusal to permit a witness for the prosecution to be asked where he lives is prejudicial error).

This case is even stronger than *Smith* and *Alford.* Questions regarding the witness's correct name and address in *Smith* had little relevance to whether the defendant actually sold the heroin in the restaurant. By contrast, Godina's fainting tendency was directly relevant to the reliability of her subsequent identification, particularly since she admitted feeling "faint" during the attack. Because the defense had medical records of fainting episodes, the potential for a damaging cross-examination was more apparent than in *Smith.* The Seventh Circuit improperly ignored *Smith* and *Alford.* Under those cases, the trial court committed constitutional error in preventing the cross-examination. *See United States v. Foster*, 986 F.2d 541, 543 (CADC 1993) ("The more important the witness to the government's case, the more important the defendant's right, derived from the Confrontation Clause of the Sixth Amendment, to cross-examine the witness.").

The cumulative effect of the above errors deprived Alvarez of a fair trial.[6] The crux of the trial was the relative credibility of the witnesses. With *no physical evidence*

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[6] The prosecutor's misconduct in response to discovery Godina's photo-identification of Alvarez in the hospital room also was prejudicial. the defense had specifically requested identification evidence in discovery. The prosecutor's failure to disclose the existence of the photo array prevented the defense from exploring at trial the highly suggestive circumstances when Godina first specifically implicated Alvarez.

linking Alvarez to the attack, Godina's identification was absolutely crucial to the prosecution. The trial court's refusal to allow cross-examination regarding fainting history bolstered her questionable identification. The eye-witness' identifications of someone else as the attacker was completely irreconcilable with Godina's identification. Anything that tended to strengthen Thompson's credibility -- such as his pre-trial exculpatory statements – would have correspondingly weakened Godina's credibility and thus the State's entire case. The two errors were complimentary. The Seventh Circuit improperly relied on a "but for" standard that all but foreclosed habeas relief, even in such a troubling case. This error arises from the fact that there is no clear standard for cumulative error in habeas cases, and it demonstrates the urgent need for this Court to bring uniformity to this important area.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 98 C 8338

DANIEL ALVAREZ, Petitioner,

v.

WILLIAM D. O'SULLIVAN,
Respondent.

[July 16, 1999, Decided
July 19, 1999, Docketed]

MEMORANDUM OPINION AND ORDER

Daniel Alvarez petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Following a jury trial, Alvarez was convicted of attempted first-degree murder and sentenced to 40 years' imprisonment. Alvarez asserts four grounds for relief in his petition: 1) the preclusion of cross-examination on the victim's tendency to faint denied his right to confront witnesses; 2) the exclusion of pre-trial non-identification statements violated his right to present a defense; 3) the cumulative effects of these alleged Sixth Amendment violations deprived him of a fair trial; and 4) the trial evidence was insufficient to support

his conviction beyond a reasonable doubt. After careful review of these issues, we conclude that Alvarez has not established a violation of his constitutional rights. Therefore, we deny his petition for a writ of habeas corpus.

RELEVANT FACTS[1]

Daniel Alvarez and Alicia Godina dated periodically for five years until spring 1993, when Godina ended the relationship. Godina encountered Alvarez several times that summer; he repeatedly, but unsuccessfully, attempted to rekindle their relationship. While walking to the train station on the morning of December 14, 1993, Godina heard footsteps approaching behind her. She testified that she turned her head to see Alvarez holding a knife. He began stabbing her in the chest. He then swung Godina around to face him, threw her against a fence, and continued stabbing her. Alvarez momentarily stopped his attack to chase a third person while Godina stood on the sidewalk feeling faint. Alvarez returned, pinned the victim to the ground, and proceeded to cut her throat. Godina then closed her eyes, feigning death, and Alvarez ran off. She testified that a gentleman helped her until an ambulance took her to the emergency room. At the hospital Godina told Thelma Kuska, a nurse, that she was stabbed by her ex-boyfriend. Kuska's testimony at trial corroborated this statement.

Peter Thompson, the gentleman who helped Godina, testified that he saw the attacker as he rounded a

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[1] This Court presumes the factual determinations of the state court are correct. 28 U.S.C. § 2254(e)(1); *Sumner v. Mata*, 449 U.S. 539, 547, 66 L. Ed. 2d 722, 101 S. Ct. 764 (1981). Unless otherwise noted, we have adopted the facts as presented in the Illinois appellate court's unreported opinion, *People v. Alvarez*, No. 94 CR 548-01, slip op. at *1-6 (Ill. App. Ct. 1998). Alvarez does not dispute these factual findings in his petition.

corner by his home. Godina's attacker fled as Thompson neared the scene with a baseball bat. Several months after the crime, Thompson viewed a photo of Alvarez and later met him in person; on both occasions, Thompson stated that Alvarez was not the man he saw stabbing Godina. (Pet. Ex. F, Trial Tr., at 17-19; Pet. Ex. B, Pet'r. Aff. at 26-33; Pet. Ex. C, Vasquez Aff., at 11-14.) Although Thompson was not permitted to disclose these out-of-court statements during the trial, he did testify that Alvarez was not the attacker. (Pet. Ex. F, Trial Tr., at 26-27; Pet. Ex. H, Trial Tr., at 14-18, 20, 51-53.)

According to Alvarez, he was pursuing a job at Royal Crown Cola (RC Cola) at the time of the attack. He arrived at the RC Cola plant at about 6:30 a.m. or 6:35 a.m.; an employee, Michael Arragoni, told Alvarez to come back later for an interview. Alvarez then saw a friend, Sal Lira, who suggested that he wait at a local restaurant. Alvarez testified that he ate and returned to RC Cola at 7:40 a.m. At trial, both Arragoni and Lira corroborated Alvarez's account of the morning. A security guard, Michael Kuciver, testified that Alvarez arrived at the plant at 6:10 a.m., left around 6:25 a.m., and returned between 7:39 a.m. and 8 a.m. After being hired at RC Cola, Alvarez went home. Later that day, he consented to a police search of his house and car and denied any knowledge of the stabbing. The police officers did not recover any physical evidence linking Alvarez to the crime. (Pet. Ex. G, Trial Tr., at 123; Pet. Ex. I, Trial Tr., at 51.)

During the trial, the two sides presented conflicting testimony about the length of time that Alvarez would have needed to drive from the RC Cola plant to the crime scene during morning rush hour. Alvarez's investigator, John Eirman, stated that it took him at least 43 minutes to drive the 17-mile distance. Alternatively, Detective Raymond

McCann testified that he completed the drive in as little as 28 minutes, depending on the time of day.

To impeach Godina's identification of Alvarez as her attacker, defense counsel attempted to question her on her tendency to faint, suggesting that she may have lost consciousness during the attack. (Pet. Ex. G, Trial Tr., at 97-99.) In response, Godina testified that she did not faint the day of the stabbing. The trial court then forbade any further cross-examination on her fainting history.

Based on this evidence, the jury found Alvarez guilty of attempted first-degree murder. The Illinois appellate court affirmed his conviction and subsequently denied his petition for re-hearing. (Pet'r.'s Mem. Supp. at 2.) Alvarez filed a Petition for Leave to Appeal with the Illinois Supreme Court, which was rejected. (Pet'r.'s Mem. Supp. at 2.) Having exhausted state remedies, he now seeks habeas corpus relief in this Court. (Pet'r.'s Mem. Supp. at 11-12.) Before assessing the merits of his claims, we set forth the applicable standards that guide our analysis.

STANDARD OF REVIEW[2]

Under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA), a federal court must deny habeas relief unless the state court's adjudication "resulted in a decision

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[2] Alvarez has procedurally exhausted his claims by presenting his federal claims to each available state tribunal on direct appeal. Thus, he has properly preserved all issues for our consideration. *O'Sullivan v. Boerckel,* 526 U.S. 838, 144 L. Ed. 2d 1, 119 S. Ct. 1728, 1731 (1999). Furthermore, the State does not object to the presentation of the issues before us. *See Gonzalez v. DeTella,* 918 F. Supp. 1214 (N.D. Ill. 1996), *aff'd,* 127 F.3d 619 (7th Cir. 1997). Therefore, we proceed directly to analyze the standards and merits of the substantive issues.

contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).[3] The standard for mixed questions of law and fact is whether the state court's application of clearly established Supreme Court law was reasonable. *Spreitzer v. Peters*, 114 F.3d 1435, 1441 (7th Cir. 1997). A state court has reasonably applied Supreme Court caselaw if its application is "at least minimally consistent with the facts and circumstances of the case." *Id.* at 1442. Under this limited analysis, the state court's decision must stand "if it is one of several equally plausible outcomes." *Ashford v. Gilmore,* 167 F.3d 1130, 1134 (7th Cir. 1999), *quoting Hall v. Washington*, 106 F.3d 742, 748-49 (7th Cir. 1997). Having set forth the applicable standards for federal habeas corpus review, we will now address the merits of Alvarez's claims.

I. Prevention of Cross-Examination as Violation of Confrontation Clause

Alvarez claims that his Sixth Amendment rights were violated when the trial court prohibited cross-examination of Godina's fainting history. He correctly notes that courts have the power to limit cross-examination where the interrogation is "repetitive or only marginally relevant." *Delaware v. Van Arsdall,* 475 U.S. 673, 679, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986). Alvarez contends that the trial court erred in finding the fainting evidence irrelevant and inadmissible because it concerned the witness' ability to observe and recall events. He points out that Godina testified to feeling faint during the attack, that she was unconscious prior to her surgery, and that

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[3] Because Alvarez does not challenge the state court's factual findings, we need not discuss the standards established in 28 U.S.C. § 2254(d)(2).

Thompson's account of the attack differs from Godina's testimony. Therefore, the record evidence raises the inference that she may have fainted that day, impairing her ability to identify Alvarez and damaging her credibility. He argues that the state appellate court's review of this claim was "superficial" because that court ignored this evidence and prior state appellate court decisions. *See, e.g, People v. Stalions,* 139 Ill. App. 3d 1033, 488 N.E.2d 297, 301-02, 94 Ill. Dec. 471 (Ill. App. Ct. 1986) (allowing cross-examination on a witness' glue-sniffing habit to assess mental processes and credibility); *People v. Spreyne,* 256 Ill. App. 3d 505, 628 N.E.2d 251, 256, 194 Ill. Dec. 754 (Ill. App. Ct. 1993) (permitting cross-examination on the defendant's alcohol consumption on the day of the crime to test his ability to observe and remember events).

The Confrontation Clause guarantees a defendant "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer,* 474 U.S. 15, 20, 88 L. Ed. 2d 15, 106 S. Ct. 292 (1985). Additionally, the subject of admissibility of evidence is generally a matter of state concern. *Estelle v. McGuire,* 502 U.S. 62, 65-69, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991); *Bryant v. Washington,* 869 F. Supp. 601, 603 (N.D. Ill. 1994). Our task is not to "second-guess" the correctness of the trial court's rulings based on state evidentiary rules; rather, we are only to decide if a constitutional right has been violated by those determinations. *Koo v. McBride,* 124 F.3d 869, 874-75 (7th Cir. 1997). To make this decision, we balance the effect of the precluded evidence on the defendant's Sixth Amendment rights against the state's interest in excluding the evidence in question. *Tague v. Richards,* 3 F.3d 1133, 1137-39 (7th Cir. 1993).

The trial court's limitation on the cross-examination of Godina could be constitutional error if her fainting history was genuinely relevant to substantive issues in the case. A witness' testimony should be subject to cross-examination if it is clearly probative of the witness' cognitive ability to recognize and identify an offender. *Henderson v. DeTella,* 97 F.3d 942, 949 (7th Cir. 1996) (holding that an inquiry into a witness' drug use is permissible only if it relates to the cognitive abilities of the witness at the time of the offense or other pertinent time); *United States v. Miranda,* 1997 U.S. Dist. LEXIS 15717, No. 94 CR 714, 1997 WL 627655, at *8 (N.D. Ill. Sept. 22, 1997) (allowing the defendant to question a witness on drug use that may have impaired "his ability to perceive, recall, and recount events at issue during the time period at issue"). Here, the line of questioning proposed by Alvarez would not have probed Godina's ability to identify him the day of the stabbing because she had already testified that she remained conscious during the attack. That she had fainted on three previous occasions, none of which had any relation to each other or to the circumstances of the stabbing, does not establish that she may have fainted while being stabbed. The *Henderson* court held that a state trial court properly excluded evidence of a witness' drug use on occasions that were not clearly related to the crime. 97 F.3d at 949. Likewise, the trial court here could properly prevent cross-examination about fainting spells that were completely unrelated to Godina's ability to recall the crime.

Alvarez argues that the evidence shows Godina may have fainted that day because 1) she was unconscious immediately before her operation, 2) she said that she "felt faint" several times, and 3) her testimony differed from Thompson's. However, these facts do not necessarily raise the inference that she fainted. While she was unconscious before the operation, she was awake in the emergency room

when she spoke with nurse Kuska. The record contains no evidence to suggest that she was unconscious prior to the operation. Although Godina did say that she "felt faint," she also testified that she did not faint the day of the attack. *Poole v. Gramley,* 1997 U.S. Dist. LEXIS 10256, No. 94 C 4148, 1997 WL 403689, at *4 (N.D. Ill. July 15, 1997) (noting that a witness' drug use was not relevant at trial because the victim had already denied using drugs at any relevant time). Additionally, the discrepancies between Thompson's and Godina's accounts of the attack do not demonstrate that she passed out. Her story, though different from his, is detailed and complete. Furthermore, Thompson, a defense witness, said that he found Godina lying on her back; yet he did *not* testify that she was unconscious at anytime during the attack. The State's interest in eliminating irrelevant and possibly confusing evidence outweighs Alvarez's interest in presenting evidence that does not concern the witness' ability to identify him.

Though we need not consider the effect of the trial court's decision, we continue our analysis to show the harmless nature of the alleged error. An error is harmless absent a showing that the decision had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 637, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993), *quoting Kotteakos v. United States,* 328 U.S. 750, 776, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946); *see also Tague,* 3 F.3d at 1140. A federal reviewing court cannot grant habeas corpus relief based on a trial error unless the petitioner demonstrates actual prejudice. *Brecht,* 507 U.S. at 637. Trial error is not prejudicial unless the petitioner can establish that it caused the conviction of an innocent person, *Thompkins v. Cohen,* 965 F.2d 330, 333 (7th Cir. 1992); *Gonzalez,* 918 F. Supp. at 1220, or at least that the outcome of the trial would have

been different if not for the error, *Murray v. Carrier*, 477 U.S. 478, 488, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986); *Austin v. Peters*, 1990 U.S. Dist. LEXIS 12263, No. 89 C 2304, 1990 WL 139272 (N.D. Ill. Sept. 17, 1990).

In light of the *Brecht* standard, we cannot say that the state trial court's exclusion of the fainting evidence had a substantial effect such that the outcome of the trial would have otherwise been different. Alvarez argues that the jury "might have inferred that she did faint" from evidence of Godina's prior fainting spells, but such a weak assertion does not show that this decision worked to his *actual* disadvantage. *Carrier*, 477 U.S. at 494; *Maciel v. Carter*, 22 F. Supp. 2d 843, 854 (N.D. Ill. 1998). Even if the trial court had allowed defense counsel to pursue this line of questioning, Godina nonetheless testified that she did not faint during the attack. Her statement was corroborated by the details she recounted and, as the Illinois appellate court noted, by the defensive wounds on her wrists. Even if the evidence permitted the jury to conclude that Godina did faint at some point, she was not unconscious for the entire attack and had ample opportunity to view and identify her attacker. Alvarez fails to show that the preclusion of this evidence actually prejudiced the outcome of his trial.

We move now to consider the reasonableness of the Illinois appellate court's application of established law to this alleged error. The appellate court correctly set forth the issue, the trial court's reasoning, and the applicable standard of review. The appellate court agreed that the fainting history was not relevant without evidence that she fainted during the attack. The appellate court cited evidence from the record to support its conclusion that the trial court had not abused its discretion in preventing the cross-examination. The appellate court's review was brief, but logical and reasonable. Therefore, it "must be respected . . .

because the grave remedy of upsetting a judgment entered by another judicial system after full litigation is reserved for grave occasions." *Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997).

II. Exclusion of Non-identification Statements as Violation of Compulsory Process Clause

Alvarez next claims that the trial court violated his Sixth Amendment right to present a defense when it excluded Thompson's two out-of-court statements that Alvarez was not the attacker. According to Alvarez, the trial court erred in finding that Thompson's proposed testimony did not fall within the identification exception to the hearsay rule as prescribed by § 115-12 of the Illinois Code of Criminal Procedure of 1963. 725 ILCS 5/115-12 (West 1994). Although Alvarez would have us review the trial court's state law determinations, we have neither the power, nor the inclination, to do so. This Court cannot sit as a super-appellate body and consider state law matters.

Applying *Brecht* demonstrates the futility of Alvarez's argument. Even if we had determined that the state trial court's ruling was unconstitutional, any error would have been harmless. Thompson testified at trial that Alvarez was not the attacker. If permitted, the repetition of that statement would not have lead to Alvarez's acquittal, especially since Godina's unimpeached identification was also presented to the jury. *See Murray*, 477 U.S. at 488. The possibility that repetition of Thompson's testimony could have carried weight with the jury is insufficient to establish actual prejudice as required by *Brecht*. *See Maciel*, 22 F. Supp. 2d at 854.

Alvarez maintains that the appellate court erred because it failed to consider federal cases from the United

States Courts of Appeals for the Second and Third Circuits. *See United States v. Brewer*, 36 F.3d 266 (2nd Cir. 1994) (holding that the identification exception of Fed. R. Evid. 801(d)(1)(c) encompasses prior failures to identify); *United States v. Brink*, 39 F.3d 419 (3rd Cir. 1994) (permitting exculpatory testimony on robber's eye-color under the identification exception to Fed. R. Evid. 801(d)(1)(c)). While these federal decisions generally support Alvarez's interpretation of the identification exception, they are certainly not binding on the Illinois appellate court. *See Lindh, 96 F.3d at 869* ("State courts must knuckle under to decisions of the Supreme Court, but not of this court."). Furthermore, neither case concerns the interpretation of the Illinois Code; both involve the Federal Rules of Evidence.[4]

Overall, we find the appellate court's review of this alleged error to be entirely reasonable. The appellate court relied upon the Illinois Code and referred to the Illinois Supreme Court's Hayes decision. The appellate court's brief review of this issue was a reasonable application of the law and, because the hearsay rule was not "applied mechanistically to defeat the ends of justice," was

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[4] Alvarez argues that the appellate court should have followed a previous decision of the Illinois Appellate court. *People v. Green*, 204 Ill. App. 3d 461, 563 N.E.2d 61, 63, 150 Ill. Dec. 474 (Ill. App. Ct. 1990) (holding that an exculpatory description of the defendant would have been admissible under the identification exception, if the issue had been raised at the proper time). It is not the business of this Court to review how Illinois courts apply and interpret Illinois law. Furthermore, the appellate court here was not required to rely on the *Green* decision. The appellate court reasonably followed a more recent Illinois Supreme Court decision that clearly prevented admission of non-identification testimony. *People v. Hayes*, 139 Ill. 2d 89, 564 N.E.2d 803, 824, 151 Ill. Dec. 348 (Ill. 1990) (holding that a witness' out-of- court statements are not admissible where the testimony does not actually identify the defendant).

consistent with Supreme Court caselaw *Chambers v. Mississippi,* 410 U.S. 284, 302, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973) (holding that the right to present a defense still must conform with established rules of evidence to "ensure fairness and reliability in the ascertainment of guilt and innocence").

III. Cumulative Effects of Trial Errors as Violation of Right to Fair Trial

In some cases, the cumulative effect of trial errors may effectively deprive a defendant of the right to a fair trial as guaranteed by the Fourteenth Amendment. *See, e.g., United States v. Haddon,* 927 F.2d 942 (7th Cir. 1991); *United States v. DeGeratto,* 876 F.2d 576 (7th Cir. 1989). Such a violation would require a combination of trial errors that alone would not have created an issue of Constitutional magnitude. However, because Alvarez has failed to demonstrate any trial or appellate errors, we must reject this claim. *See Maciel,* 22 F. Supp. 2d at 857; *Gonzalez,* 918 F. Supp. at 1225.

IV. Failure to Be Proven Guilty Beyond a Reasonable Doubt as Violation of Fourteenth Amendment

Alvarez's final claim is that he was not proven guilty beyond a reasonable doubt in violation of the Due Process Clause. *See In Re Winship,* 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). He contends that (1) the lack of physical evidence connecting him to the crime, (2) Thomson's exculpatory testimony, (3) the time frame and interview alibi, and (4) the unreliability of Godina's identification, should have raised reasonable doubts in the mind of any rational juror. He argues that the state appellate court's review of this issue was unreasonable because it considered the pieces of evidence in isolation,

rather than in conjunction. *See United States v. Maldonado-Rivera*, 922 F.2d 934, 978-79 (2nd Cir. 1990) (noting that pieces of evidence must be viewed in conjunction, rather than in isolation).

A state appellate court facing a sufficiency of the evidence claim must determine whether, after reviewing the record evidence "in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). Under AEDPA, this Court may grant a writ of habeas corpus only if the reviewing state court unreasonably applied the *Jackson* test. *Gomez v. Acevedo*, 106 F.3d 192, 199 (7th Cir. 1997); *DeCreti v. Wilson*, 967 F. Supp. 303, 305 (N.D. Ill. 1997). This Court cannot choose evidence it prefers or make its own credibility determinations -- these tasks are the sole responsibility of the trier of fact. *Ford v. Ahitow*, 104 F.3d 926, 937-39 (7th Cir. 1997). To satisfy this standard, Alvarez must offer more than an argument for innocence. *Bryant*, 869 F. Supp. at 602. Rather, he must show that the facts of the case "establish by clear and convincing evidence" that no reasonable fact-finder would have found him guilty, absent constitutional error. 28 U.S.C. § 2254(e)(2)(B). In short, the writ may be granted only if doubt is *compelled* by evidence in the record. *DeCreti*, 967 F. Supp. at 305.

Though Alvarez believes that the Illinois appellate court should have followed Maldonado-Rivera's collective evidentiary analysis, we have found no reliance on that case or proposition in this Circuit. As noted earlier, a decision from a foreign federal circuit is not binding on the Illinois appellate court. *See Lindh*, 96 F.3d at 869. The state appellate court had no power to reweigh evidence or substitute its judgment for that of the jury. *Jackson*, 443

U.S. at 319; *Ford*, 104 F.3d at 937-38. A conviction may be reversed "only when the record is devoid of any evidence, *regardless of how it is weighed*, from which a jury could find guilt beyond a reasonable doubt." *United States v. Ross*, 77 F.3d 1525, 1542 (7th Cir. 1996) (emphasis added).

Finally, we consider the reasonableness of the appellate court's review of Alvarez's sufficiency of the evidence claim. That court cited the correct "no rational trier of fact" standard. *See Jackson,* 443 U.S. at 319; *People v. Collins*, 106 Ill. 2d 237, 478 N.E.2d 267, 277, 87 Ill. Dec. 910 (Ill. S. Ct. 1985). Showing detailed knowledge of the record, the court addressed several major pieces of evidence that Alvarez claims should have raised reasonable doubt in rational jurors. The appellate court gave appropriate deference to the trier of fact, particularly on the several credibility determinations that were crucial to this case. We find that the appellate court's ruling involved a good-faith, thoughtful, and responsible review, as required by the *Jackson* standard. *Gomez*, 106 F.3d at 199; *Lindh*, 96 F.3d at 871. Therefore, we must also reject Alvarez's sufficiency of the evidence claim.

CONCLUSION

For the reasons set forth above, we deny Alvarez's petition for a writ of habeas corpus. The Clerk of the Court is instructed to enter judgment pursuant to Federal Rule of Civil Procedure 58, in favor of the respondent.

ENTERED: Judge Ruben Castillo

Northern District of Illinois

JULY 16, 1999.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of the respondent William D. O'Sullivan and against petitioner Daniel Alvarez. This cause of action is dismissed in its entirety. There being no just reason for delay, this is a final and appealable order.

Date: 7/16/1999

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 98 C 8338

DANIEL ALVAREZ, Petitioner,

v.

WILLIAM D. O'SULLIVAN, Respondent.

ORDER

Daniel Alvarez filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising the following claims: 1) the trial court denied Alvarez's right to confront a witness against him by preventing Alvarez from cross-examining the victim about her tendency to faint; 2) the trial court violated Alvarez's right to present a defense by excluding an eyewitness's pre-trial statements that the defendant was not the attacker; 3) the cumulative effect of these alleged Sixth Amendment violations deprived Alvarez of a fair trial; 4) the trial evidence was insufficient to support his conviction. On July 16, 1999 we denied Alvarez's petition, finding that the four claims did not entitle Alvarez to habeas relief. Currently before the Court is Alvarez's application for a certificate of appealability pursuant to 28 U.S.C. § 2253.

This Court has carefully reviewed Alvarez's application in light of our prior opinion and the record. We deny Alvarez's application for a certificate of appealability as to his first, second, and fourth claims, as he has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). However, we grant Alvarez's application as to his third claim, enabling Alvarez to present to the Seventh Circuit his argument that the cumulative effect of the alleged Sixth Amendment violations deprived him of a fair trial.

ENTERED: /s/ Ruben Castillo
Judge Ruben Castillo
Northern District of Illinois

August 19, 1999

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-3175

DANIEL ALVAREZ, SR., PETITIONER-APPELLANT

v.

WILLIAM E. BOYD, RESPONDENT-APPELLEE.

[Argued: March 28, 2000
Decided: August 29, 2000]

Before: EASTERBROOK, MANION, and EVANS, Circuit Judges.

DANIEL A. MANION, *Circuit Judge.*

At 7:00 a.m. on December 14, 1993 Alicia Godina, while walking to a commuter train, was attacked and severely stabbed. She identified Daniel Alvarez, a former boyfriend, as the attacker. However, Alvarez not only denied it and presented a plausible alibi, but also the only eyewitness to the attack said Alvarez was not the perpetrator. Nevertheless, an Illinois jury convicted him of attempted first-degree murder. He was sentenced to forty years in prison. Alvarez brought this §2254 motion, arguing that the cumulative effect of two evidentiary rulings denied

him a fair trial. The district court denied relief but granted a certificate of appealability. This was a close case with each side presenting very conflicting evidence. Nevertheless, a jury resolved the difficult questions and found him guilty. We conclude he received a fair trial, and so we affirm.

I.

On the morning of December 14, 1993, Alicia Godina was on her way to work following the usual route from her house to the train station in her Chicago neighborhood along East 93rd Street. She testified that shortly after she left her house at 6:55 a.m., she heard someone behind her. When she turned around she saw her ex-boyfriend--Daniel Alvarez. He was holding a knife, which he then used to stab her. Godina testified that Alvarez temporarily halted the attack when a man yelled at him to stop. According to her, Alvarez ran after the man, but soon returned, got on top of Godina and began to cut her throat. She said that she closed her eyes and feigned death, at which time Alvarez ran away.

A nurse from the emergency room testified that Godina suffered multiple stab wounds to her neck, chest, abdomen, and wrists. When she arrived at the hospital she was close to death: because the knife had penetrated her heart, she had only a faint heartbeat and only minimal blood pressure. Yet apparently she was conscious at some point because she informed a nurse (without mentioning any names) that her "ex-boyfriend" had attacked her. Godina underwent emergency surgery, without anesthesia because of her faint heartbeat, and eventually recovered from the attack.

Because of Godina's accusation, the police went looking for Alvarez. About 2:00 p.m. on the day of the attack, a small band of officers went to his parents' house

where he lived. Alvarez was there and he identified himself, invited the officers into the house, and consented to a search of the house and his van. The police did not find any physical evidence linking Alvarez to the crime. Nevertheless, based on Godina's accusation, they took Alvarez down to the police station for questioning. A grand jury eventually indicted Alvarez on one count of attempted first-degree murder, three counts of armed violence, and four counts of aggravated battery. Most of the charges were eventually dismissed, but Alvarez was tried by a jury for attempted first-degree murder.

At trial, the jury heard Godina's version of the attack and also learned about her prior relationship with Alvarez. Godina testified that she started dating Alvarez when she was fourteen years old, and they dated for about three and one-half years. Godina characterized Alvarez as jealous and possessive, particularly after she broke off the relationship in June 1993. She described Alvarez as unhappy with the breakup, although they both moved on and occasionally met for lunch. Godina regularly took a Metra train to downtown Chicago, and she told the jury that on four occasions Alvarez followed her onto the train, although she admitted that this might have been a coincidence, as Alvarez also took the same train to and from his job in downtown Chicago. She testified that after August 25, 1993, she did not again see Alvarez until the attack on December 13.

The prosecution's case was necessarily brief, as it centered on Godina's testimony. The defense's star witness was Peter Thompson, who was the only person to see the stabbing other than the victim and the attacker. Thompson testified that he was leaving his house on his way to work when he saw the assailant first follow and then attack Godina. Thompson was only about three or four feet from

them during part of the attack. When the attacker saw Thompson, they faced each other and briefly made eye contact before Thompson went to his car to obtain a bat, whereupon the attacker ran away. Thompson testified that he looked closely at the assailant, that he remembered his facial features, hair color, mustache, build, and height. Although at some point he was not certain he could identify the attacker, he was positive that Alvarez was not the man who stabbed Godina. Thompson also related that, although the police interviewed him, they never showed him photographs of Alvarez or any other suspects, and never got around to having him view a lineup of suspects. Thompson claimed he knew neither Godina nor Alvarez, and thus apparently had no motive to lie. He also lent some support to the defense's theory that Godina's memory of the attack may have been faulty, as he testified that he never yelled at the attacker to stop, as Godina's testimony indicated.

Other testimony also gave reason to believe that Alvarez may not have been the attacker. Alvarez testified that on the morning of the assault he was at Peggy's Restaurant, a small diner near the Royal Crown Cola plant where he had a job interview. While no witness fully corroborated Alvarez's testimony about being at the restaurant during the attack, several Royal Crown employees testified that Alvarez showed up for an interview at their plant at 47th Street and California Street between 6:15 and 6:30 a.m. Because the trucks needed to be dispatched, he was told to return around 7:30 a.m. According to Alvarez, he went to the restaurant to have something to eat, and returned to the Royal Crown plant around 7:40. Royal Crown employees confirmed that Alvarez returned to the plant between 7:30 and 8:00 a.m. This narrow space of time raises some troubling questions. It gave Alvarez, at most, one hour and forty-five minutes to

drive from the Royal Crown plant to the scene of the attack. The timing had to be precise. He had to drive from Royal Crown to the crime scene, park his van, stalk and stab Godina, flee to his van, ditch the knife, perhaps clean up any blood and ensure that he did not leave any traces in the van, and drive back to the plant and look presentable at the interview. And all this during peak driving times.

A private investigator testified that, based on two experiments driving the route, to travel the approximate fifteen miles between the Royal Crown plant and the site of the attack at East 93rd Street would have taken forty-three minutes, assuming the driver traveled the speed limit and used the Dan Ryan Expressway during *non-peak driving times*. A state investigator testified that he made the drive from the plant to the attack site in as little as twenty-eight minutes during non-peak times, and thirty-seven minutes during rush hour. Because the attack occurred around 7:00, and the undisputed testimony was that Alvarez was at the plant no earlier than 6:15, it would have been difficult for him to have committed the crime. True, the attack might have occurred as late as 7:10 or possibly even 7:15, but if that's the case, it would have been extremely difficult for Alvarez to make it back to the Royal Crown plant by 7:40.

Alvarez's case is also striking by its contrast. He doesn't fit the profile of violent offenders often in this court. The jury and sentencing judge heard that he had no juvenile record or history of violence, and that he came from a stable, two-parent home where he still lived. Alvarez completed high school with a respectable GPA, and while a student he participated in sports and received awards for perfect attendance. Alvarez also earned an associate's degree in computer business systems and accounting. He had a good work record, and had no arrests or convictions, even for minor crimes. He is not a member

of a gang and there is no indication that he used drugs or drank to excess. Furthermore, his relationship with Godina was not sexual or passionate, and their "dates" usually consisted of sitting on the front porch of her home. Although he was apparently upset after she broke off the relationship, within a week of their breakup they both were dating other people. Thus, the prosecution's attempt to paint Alvarez as the jealous and jilted ex-boyfriend was less than stellar. Nevertheless, Godina was adamant that Alvarez was the attacker. For whatever reasons the jury found most compelling, it convicted Alvarez of attempted first-degree murder. The judge sentenced Alvarez to forty years imprisonment. The Illinois Court of Appeals affirmed his conviction, *People v. Alvarez,* No. 94 CR 548-01 (Ill. App. Ct. [*824] 1997), and the Illinois Supreme Court rejected his petition for leave to appeal. *People v. Alvarez*, 174 Ill. 2d 569, 686 N.E.2d 1164, 227 Ill. Dec. 8 (Ill. 1997).

Alvarez filed this § 2254 motion, asserting four grounds for relief. First, Alvarez contended that he was denied his right to confront adverse witnesses because the trial court declined to let him cross-examine Godina about her tendency to faint. The district court concluded that no constitutional error occurred because this line of questioning was not particularly relevant, and that any error was harmless. *Alvarez v. O'Sullivan*, 58 F. Supp. 2d 882, 886, 887 (N.D. Ill. 1999). Second, Alvarez argued that the trial court denied him the right to present a defense by excluding Thompson's pretrial statement that the defendant was not the attacker. The district court held that this was hearsay that was not subject to any exception, and thus the district court did not err in excluding it. Also, even if it were an error, the error was harmless. *Id.* at 887, 888. Alvarez then argued that, even if these two errors could not be considered prejudicial when considered separately, their cumulative effect was to deny him a fair trial in violation of

the Due Process Clause of the Fourteenth Amendment. The district court rejected this argument because Alvarez had to show that there were at least two trial errors, but he failed to demonstrate that there was even one. *Id.* at 888. His fourth argument was that there was insufficient evidence to support the conviction, which the district court quickly dispatched based on Godina's testimony that we recounted above. *Id.* at 889. Alvarez sought from the district court a certificate of appealability as to all four claims, but the district court granted one only as to Alvarez's cumulative effect argument, which is, therefore, the only issue on appeal.

II.

To prevail on his Section 2254 motion, Alvarez must show that a decision by the Illinois state courts "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) & (2); *see Williams v. Taylor*, 146 L. Ed. 2d 389, 120 S. Ct. 1495, 1521 (2000).

Trial errors which in isolation are harmless might, when aggregated, alter the course of a trial so as to violate a petitioner's right to due process of law. *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15, 56 L. Ed. 2d 468, 98 S. Ct. 1930 (1978); *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000); *United States v. Haddon*, 927 F.2d 942, 949 (7th Cir. 1991).[1] "The cumulative [**11] effect of two or more

[1] One circuit has held that the cumulative effect of trial errors does not provide a basis for relief in a § 2254 motion. *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) ("errors that are not unconstitutional individually cannot be added together to create a constitutional violation"). Because

individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990) (*en banc*); *United States v. Rogers*, 89 F.3d 1326, 1338 (7th Cir. 1996). To prevent the synergistic effect of these errors from escaping review, courts attempt to determine whether the whole is greater than the sum of its parts. The cumulative effect analysis requires a petitioner to establish two elements: (1) at least two errors were committed in the course of the trial; (2) considered together, along with the entire record, the multiple errors so infected the jury's deliberation that they denied the petitioner a fundamentally fair trial. *Jackson v. Johnson*, 194 F.3d 641, 655 n.59 (5th Cir. 1999); *United States v. Copple*, 24 F.3d 535, 547 n.17 (3d Cir. 1994); *Rivera*, 900 F.2d at 1471 n.11.

As to the first prong (were there two errors), if there was no error, or just a single error, there are no ill effects to accumulate and so a petitioner in such a case could not prevail on this theory. *Van Woudenberg ex rel. Foor v. Gibson*, 211 F.3d 560, 571 (10th Cir. 2000); *United States v. Stokes*, 124 F.3d 39, 43 (1st Cir. 1997); *United States v. Akinsanya*, 53 F.3d 852, 859 (7th Cir. 1995). Courts will consider only plain errors or errors which were preserved for appellate review. *United States v. Munoz*, 150 F.3d 401, 418 (5th Cir. 1998); *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993). As to the second prong (cumulative errors affected fundamental fairness), the Constitution entitles the petitioner to a fair trial, not a perfect one. *Rose v. Clark*, 478 U.S. 570, 579, 92 L. Ed. 2d 460, 106 S. Ct. 3101 (1986); *Rogers*, 89 F.3d at 1338. And courts must be careful not to magnify the significance of

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neither party has addressed this issue, however, we do not consider it.

errors which had little importance in the trial setting. *United States v. Ward*, 190 F.3d 483, 491 (6th Cir. 1999). This requires an examination of the entire record, paying particular attention to the nature and number of alleged errors committed; their interrelationship, if any, and their combined effect; how the trial court dealt with the errors, including the efficacy of any remedial measures; and the strength of the prosecution's case. *United States v. Fernandez*, 145 F.3d 59, 66 (1st Cir. 1998); *United States v. Thomas*, 93 F.3d 479, 487 (8th Cir. 1996); *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996); *Haddon*, 927 F.2d at 949. To warrant relief, the reviewing court must determine that the effect of the errors, considered together, could not have been harmless. *United States v. Oberle*, 136 F.3d 1414, 1423 (10th Cir. 1998). Put another way, a court must be firmly convinced that but for the errors, the outcome of the trial probably would have been different. *Santos*, 201 F.3d at 965; *United States v. Thornton*, 1 F.3d 149, 156 (3d Cir. 1993); *Solles v. Israel*, 868 F.2d 242, 248 (7th Cir. 1989) (prosecutorial misconduct).

As the district court noted, Alvarez cannot prevail on his cumulative effect argument because he failed to show that there was even a single error, much less two. The district court's opinion adequately explains why questions about Godina's purported tendency to faint is not relevant. She did not faint as a result of the stabbing, and other unrelated fainting incidents would have no indication that she would or would not have fainted during the attack. We only add that the result might have been different if Alvarez had also offered evidence that fainting has a correlation with faulty memory or delusions. Because no such evidence was tendered, her propensity to lose consciousness was irrelevant. As to the trial court's decision to exclude Thompson's prior statement that Alvarez was

not the assailant, Alvarez has not demonstrated that this was not hearsay, or that an exception to the hearsay rule is applicable. Moreover, he hasn't overcome a second, perhaps more compelling ground for exclusion: the fact that the statement would have been cumulative of Thompson's nearly identical trial testimony. Thompson was unequivocal in his assertion that Alvarez was not the attacker. There was no evidence that he told anyone something different. Because Alvarez has not shown that the testimony was admissible, he cannot show that the trial court committed at least two errors. And without establishing the requisite two errors, Alvarez cannot prevail on a cumulative effect claim.

Furthermore, even if Alvarez had established the existence of two trial errors, we would not say that the cumulative effect of the district court's decisions denied him a fair trial. For largely the same reasons that these decisions were not errors, they could not have caused Alvarez prejudice. Thus, even if Alvarez had elicited testimony from Godina that she had a tendency to faint, this wouldn't have helped Alvarez's case because he was not going to present evidence that fainting causes mistaken memories. Thus, simply preventing the jury from hearing that Godina occasionally loses consciousness did not harm Alvarez's case. Similarly, because the jury heard first-hand Thompson's adamant assertion that Alvarez was not the attacker, testimony about Thompson previously making the same assertion would have produced little benefit for Alvarez that he didn't already enjoy. Indeed, any added advantage would have been so minimal that Alvarez can hardly say that being denied this testimony, along with the testimony about Godina's fainting, denied him a fair trial. This is true even though the evidence against Alvarez, taken together, was far from overwhelming.

III.

The sharply conflicting testimony of Godina on the one hand and Alvarez and Thompson on the other, coupled with other conflicts of timing and motive, do make this a close, even troubling case. The time span between Alvarez's first and second visits at the Royal Crown Cola plant was so narrow that the attack had to be precisely executed. This, along with Thompson's insistence that Alvarez was not the attacker and the investigators' inability to find any corroborative evidence linking Alvarez to the crime scene, adds to the mystery. But Godina's testimony was unwavering and as long as the trial was fair, this court must rely on the jury, not the cold record, to resolve questions of witness credibility and conflicting evidence.

Alvarez has failed to show that the trial court committed any errors in excluding testimony. Because he cannot show that he suffered the effects of multiple errors, he cannot avail himself of the cumulative error analysis. Alvarez received a fair trial, and the decision of the district court to deny Alvarez's § 2254 petition is AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

October 24, 2000

Before

Hon. Frank H. Easterbrook, *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

No. 99-3175

Appeal from the United State District Court for the Northern District of Illinois, Eastern Division

Daniel Alvarez, Sr.,

Petitioner-Appellant,

No. 98 C 8338

v.

Ruben Castillo, *Judge.*

William E. Boyd,

Respondent-Appellee.

AMENDED ORDER

On consideration of the petition for rehearing *en banc* filed by Plaintiff-Appellant on September 12, 2000 and the answer filed by the Defendant-Appellee, all of the judges on the panel have voted to deny rehearing, and no judge in regular active service has requested a vote on the petition for rehearing *en banc*.[1] The petition is therefore DENIED.

[1] Chief Judge Flaum and Circuit Judge Williams took no part in the consideration of this case.

APPENDIX E

28 U.S.C. § 2254 provides in pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State;
or

(B) (i) there is an absence of available State corrective process;
or
(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

* * *